STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Honorable Douglas B. Shapiro, Presiding Judge

PENNY JO JOHNSON,

Plaintiff-Appellee,

v

JOHN RECCA,

Defendant-Appellant.

Supreme Court No. 143088
Court of Appeals No. 294363
Lower Court No. 08-11513-NF

AMICUS CURIAE BRIEF OF THE INSURANCE INSTITUTE OF MICHIGAN IN SUPPORT OF APPELLANT'S APPEAL

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Insurance Institute of Michigan (IIM) is a non-profit governmental affairs and public information association representing over 90 insurance-related organizations operating in Michigan. IIM's member organizations provide insurance to the automobile, homeowner, workers compensation, and medical malpractice markets in Michigan. The association's purpose is to serve as a focal point for educational, media, legislative, and public information on insurance issues. It is a respected spokesperson for Michigan's property and casualty insurance industry, and is often invited by this Court to submit amicus briefs.

IIM has a significant interest in the outcome of the instant case. Its members must establish their rates by taking into account losses and expenses. The Court of Appeals in the instant case has opened up a whole new area of increased expenses by conflating ordinary household tasks such as cleaning, cooking, and grocery shopping, which are capped by no-fault at $20 a day for three years, with allowable expenses such as medical care. In doing so, the Court has created a loophole through the tort side of the reparations system for recovery of expenses for these mundane tasks, which are as necessary to an uninjured person as an injured person, even though no provision for the loophole was made by the Legislature.

If the Court of Appeals opinion is allowed to stand, its detrimental implications will be felt by the insurance industry statewide.

INTRODUCTION AND REASONS SUPPORTING APPEAL

Insurers are surrogates for consumers, who must purchase auto insurance to legally drive. The no-fault reparations system only works if costs are contained. One of the cost-containment measures employed by the Legislature was to limit tort recovery. Whether a cost is put on the liability side of the policy or the no-fault personal protection insurance (PIP) side, it is still an accident reparation cost that must be borne by the system.

The Legislature has defined allowable expenses by context as expenses for medical and rehabilitation services, and the care associated with these services. This Court has recognized for more than 100 years that attendant care is synonymous with nursing or medical care, and has distinguished this type of care from ordinary services such as house cleaning, meal preparation, and shopping. The Legislature adopted the distinction between medical services and ordinary services. It capped recovery for these ordinary services at $20 a day for a maximum of three years, and did not provide an avenue of recovery through a third-party tort action for ordinary services benefits in excess of the cap.

The Court of Appeals in the instant case conflated the distinction between these two types of benefits. It held that ordinary services are merely a subcategory of allowable expenses. By doing so, the Court provided a loophole around the limitations on ordinary services that were placed by the Legislature. This creates a liability insurance exposure for "excess" ordinary services costs. This will add a liability insurance cost to the system with an additional "attendant care" type of cost. If the Court of Appeals' decision is allowed to stand, its implications will be felt both state and industry-wide.

According to a 2008/2009 Auto Insurance Database Report issued by the National Association of Insurance Commissioners, Michigan's average auto insurance premium was $1042 in 2009, making Michigan the 11th highest state in the country for insurance premiums. See attached as Exhibit A. The MCCA has increased the per-car premium effective July 1, 2012 by 21 percent, $30 per insured car, to go up from $145 to $175 per insured vehicle. Part of the assessment is for the deficit, at $310 per insured car. See press release by the MCCA, attached as Exhibit B. It cannot be overemphasized that this is per insured vehicle. Adding costs stresses further the system which already has 17 percent uninsured drivers. The Court of Appeals decision adds more costs to the system by a new-found and incorrect interpretation of the act. This Court should reverse.

STATEMENT OF FACTS

Insurance Institute of Michigan adopts the statement of facts contained in defendant-appellant John Recca's brief on appeal.

STANDARD OF REVIEW

The Insurance Institute of Michigan agrees with the standard of review stated in defendant-appellant John Recca's brief on appeal.

LEGAL ARGUMENT

The issue as limited in this Court's order granting leave is:

> whether MCL 500.3135(3)(c), which permits an injured person to recover excess damages for allowable expenses, work loss, and survivor's loss in third-party actions, includes within its scope the cost of replacement services rendered more than three years after the date of the motor vehicle accident.

I. The Court of Appeals Decision Will Have Broad Detrimental Implications on the Entire No-Fault System.

This is a third-party tort recovery case. The broad implications of the Court of Appeals decision must be considered. This is a published case and therefore must be followed absent correction by this Court. Whether a cost is put on the liability side of the policy or the PIP side, it is still an accident reparation cost that adds to the ultimate premium cost. The problem here is that the Court of Appeals is adding costs to the system by encouraging the attendant care type of claim to be expanded and visited on the liability side as excess attendant care styled as replacement services.

By classifying ordinary expenses as a subcategory of allowable expenses, the lower court has made it so that non-medical services may be compensated without limitation contrary to the Legislature's express intention to limit these expenses to $20 a day and its clear exclusion of these expenses from tort recovery. If plaintiff's reading of MCL 500.3135(3)(c) is correct, it begs the question <u>exactly what tort liability was abolished</u> by the general rule, "Notwithstanding any other provision of law, tort liability . . . is abolished"?

An insured is already entitled to unlimited reimbursement of incurred allowable expenses as long as they are reasonable and reasonably necessary. The insured is expressly permitted to seek excess damages for allowable expenses, work loss, and

survivor's loss. And the insured is entitled to up to $20 a day ($7,300 a year) for ordinary services, commonly referred to as replacement services, for three years. The only thing excluded by the Legislature from recovery was excess replacement services. But the Court of Appeals has now stated that a claimant is entitled to that as well, even though not provided for by statute.

What happens when a doctor prescribes 24-hour attendant care? Since attendant care is not specified in the no-fault act, unlike the express provisions in the Workers Compensation Act,[1] and there is no definition for attendant care, nor licensing and training curriculum in colleges or trade schools for attendant care, it has become an ill-defined substantial cost. The effect of the Court of Appeals decision will allow prescriptions for both attendant care and for ordinary services to maximize both PIP and liability insurance recoveries. Attendant care is often prescribed without distinguishing hours for ordinary services from allowable expense care. Nothing will stop a claimant from "double-dipping" by claiming entitlement to reimbursement for 24-hour attendant care, plus $20 a day for replacement services, and then turning around and seeking unlimited additional "excess replacement service" expenses through a third-party tort action. Under the Court of Appeals' analysis in the instant case, this is as certain as night follows day.

To understand the limitations placed on tort recovery and the choices made by the Legislature in enacting no-fault, it is important to recall the tort-based automobile insurance scheme that existed before no-fault. The prior tort-based scheme required the injured person to prove that the other driver involved in the accident was negligent in order to recover damages from that driver's insurer. Minor injuries were often over-

[1] MCL 418.315.

compensated while serious injuries were often under-compensated. Those who did recover often faced lengthy delays, and the cases overburdened the judicial system. *Shavers v Atty Gen,* 402 Mich 554, 621-622; 267 NW2d 72 (1978).

The Legislature's response to these deficiencies, the no-fault act, provided a trade-off – an injured person was given the right to seek compensation from his or her own insurance company regardless of his or her fault; in exchange for this guaranteed compensation, the person lost the right to sue for pain and suffering in all but a limited set of circumstances. Joost, Automobile Insurance and No-Fault Law 2d, quoting *Black's Law Dictionary* (6th Ed). And the person was limited by no-fault with regard to the economic damages that could be recovered. MCL 500.3135(3)(c). In order for this system to work, however, purchase of the insurance had to be compulsory "whereby every Michigan motorist would be required to purchase no-fault insurance."[2] *Shavers, supra* at 578. Because the Legislature recognized the importance of being able to drive, it required that this compulsory insurance be available at "fair and equitable rates." *Id.* at 580. This Court has aptly perceived that this means affordable:

> "'The no-fault insurance act was a radical restructuring of the rights and liabilities of motorists. Through comprehensive action, the Legislature sought to accomplish the goal of providing an equitable and prompt method of redressing injuries in a way which made the mandatory insurance coverage affordable to all motorists.'" [*State Farm Fire & Cas Co v Old Republic Ins Co,* 466 Mich 142, 150 n 6; 644 NW2d 715 (2002) (emphasis added), quoting *Michigan Educational Employees Mut Ins Co v Morris,* 460 Mich 180, 194; 596 NW2d 142 (1999), quoting *Tebo v Havlik,* 418 Mich 350, 366; 343 NW2d 181 (1984).] (Emphasis added).

An early case of this Court in no-fault jurisprudence stated the affordability principle directly: "Because the first-party insurance proposed by the act was to be compulsory, it was important that the premiums to be charged by the insurance

[2] MCL 500.3101 sets forth the compulsory insurance requirements.

companies be maintained as low as possible. Otherwise the poor and disadvantaged people of the state might not be able to obtain the necessary insurance." *O'Donnell v State Farm Mut Ins Co,* 404 Mich 524, 547; 273 NW2d 829 (1979). This Court in *Shavers* raised this to a constitutional plane when it held that the no-fault insurance scheme was unconstitutional without sufficient mechanisms to ensure that the compulsory insurance remained available at fair and equitable rates. *Id.* at 581. At the same time, rates had to be neither excessive nor inadequate, nor unfairly discriminatory. *Shavers, supra,* 402 Mich at 649, citing MCL 500.2403(1). See also MCL 500.2109(1)(a). To not be an inadequate rate for the coverage provided, there is a correlation of costs to rates. There is no "free lunch."

To ensure that insurance rates were kept affordable, the Legislature recognized that compensation had to be curtailed when it limited recovery in several significant respects. Importantly to the instant case, the Legislature partially abolished the common-law tort remedy for economic damages through MCL 500.3135. Thus, while the injured person was entitled to certain reparations without fault, there are limitations. Indeed, PIP is not even designed for all economic losses. *Belcher v Aetna Cas & Sur Co,* 409 Mich 231, 245; 293 NW2d 594 (1980). Cost containment must be an important consideration in construing the act. See *Griffith v State Farm Mut Automobile Ins Co,* 472 Mich 521, 539; 697 NW2d 895 (2005) ("Plaintiff's interpretation . . . stretches the language of the act too far, and, incidentally, would largely obliterate cost containment for this mandatory coverage. We have always been cognizant of this potential problem when interpreting the no-fault act, and we are no less so today").

The problem is that courts have expanded non-core benefits without regard to the *Shavers* Court's point that the system has to end up so people can afford to drive legally. The judicial expansions have already threatened even the core benefits such as unlimited medical benefits that were intended to be covered. With the Court of Appeals decision in the instant case, benefits are now being expanded to a new level in the guise of tort claims. No other reparations insurance program has been taxed with providing funding for homes, cars, and attendant care the way that courts have placed this burden on the no-fault system.

Under no-fault, a person may seek funding to obtain a new home. See *Williams v AAA,* 250 Mich App 249; 646 NW2d 476 (2002). Also, funding for a new base van in addition to modifications may be sought under no-fault, see *Begin v Michigan Bell Tel Co,* 284 Mich App 581, 587-589; 773 NW2d 271 (2009), whereas under workers' compensation the van is not recoverable and only the modification is. *Weakland v Toledo Engineering Co,* 467 Mich 344, 350; 656 NW2d 175 (2003). No-fault may pay family members to provide attendant care on a 24 hour basis, hence even while they are sleeping, albeit reined in some to disapprove of paying family members an additional shift differential in recognition of the fact that family members must be attending to their own needs during the same time seeking to be paid by insurers for caring for others. See *Bonkowski v Allstate Ins Co,* 281 Mich App 154, 173; 761 NW2d 784 (2008). By contrast, workers' compensation limits family-provided attendant care to 56 hours a week. MCL 418.315(1). If the Court of Appeals decision is allowed to stand, the system will be further taxed with unlimited responsibility for ordinary services such as house cleaning, cooking, and grocery shopping.

The cost containment and affordability guidance in interpreting the act has been long recognized by this Court in *Shavers, O'Donnell, State Farm v Old Republic*, and, most recently in *Griffith* (and its footnote 15), but not honored by the lower courts that continue to expand non-core no-fault benefits, and which are now branching into the tort realm to expand these benefits beyond no-fault limits.

Although this Court has limited the scope of the issue in the instant case to whether MCL 500.3135(3)(c) permits the cost of replacement services rendered more than three years to be recovered, whether the benefits come from an insurer while wearing its PIP hat or whether the benefits come from an insurer while wearing its liability hat, still, the benefits must come from an insurer, who must pass the costs on to the consumers. Either way, increased recoveries, whether under no-fault or in tort, means increased insurance rates for all insureds. This is because insurers are ultimately surrogates for consumers who fund the pool of recovery funds through their payments of premiums. Rates take into account losses and expenses, both as a statutory mandate, MCL 500.2109(1)(c), as well as under *Shavers.* To include ordinary replacement services such as house cleaning, dish washing, meal cooking, and grocery shopping as a subcategory of allowable expenses the excess of which is recoverable in tort adds another attendant care type of expense to the system.

Certainly the Legislature has already taken steps to curtail excesses. Several bills have been introduced that propose restrictions on attendant care/nursing services similar to those contained in the workers' compensation act by limiting the number of hours of care by a non-certified caregiver that can be claimed to 56 hours a week (thus demonstrating the similar treatment by the Legislature to these two pieces of legislation

designed to provide compulsory reparations coverage).[3] See SB 294 (introduced 3/24/11, referred to Committee on Insurance 3/24/11), HB 4936 (introduced 9/13/11, referred to Committee on Insurance 9/13/11, referred to second reading 10/13/11), and SB 649 (introduced 9/15/11, referred to Committee on Insurance 9/15/11). These bills, while valiant attempts at curbing no-fault costs, contain differing provisions. They have not and may never be passed. Nevertheless, the bills demonstrate the Legislature's recognition that even without the prod like this Court provided to the Legislature in *Shavers,* cost-containment must be made to Michigan no-fault if the system is to survive.

And while the Legislature attempts to curb costs by putting limitations on the core medical benefits intended to be recovered, opinions like that of the Court of Appeals in the instant case continue to expand a plaintiff's recovery, now in the third-party liability context, to provide what is essentially unlimited reimbursement for even the most ordinary and mundane household tasks of cooking, cleaning, and grocery shopping. On the liability side, insurers are pressured to pay settlements to protect policyholders from excess liability. Cf *J Farmer Leasing, Inc v Citizens Ins Co,* 472 Mich 353, 256 n 3; 696 NW2d 681 (2005) ("Michigan recognizes an insured's claim against its insurer for bad faith in refusing to settle"). Thus, adding a liability exposure means adding costs to the system and to consumers.

[3] See MCL 418.315 ("Attendant or nursing care shall not be ordered in excess of 56 hours per week if the care is to be provided by the employee's [family member]"). These three bills further place restrictions on the hourly amount that can be charged for attendant care services.

II. Principles of Statutory Construction Show Error in the Court of Appeals Decision.

The issue in the instant case is solely an issue of statutory construction. The purpose of statutory interpretation is to effectuate legislative intent. *Michigan Ed Ass'n v Secretary of State,* 489 Mich 194, 252; 801 NW2d 35 (2011). The first place to look in determining legislative intent is the actual language used in the statute. *Id.* at 252-253. The statute must be read as a whole, and every phrase or word should be given effect if possible. *Id.* at 253. The meaning of individual words and phrases must be interpreted by reading them in context with the entire legislative scheme. *Id.*

When the Legislature uses the same word or phrase throughout a statute or act, courts should attribute the same meaning throughout. *Robinson v City of Lansing,* 486 Mich 1, 17; 782 NW2d 171 (2010), citing *Paige v Sterling Heights,* 476 Mich 495, 520; 720 NW2d 219 (2006). Conversely, when the Legislature has used different terms, it must be assumed that different meanings were intended. 2A Singer & Singer, Sutherland Statutory Construction, (7th Ed), § 46:6, p 252.

A. The No-Fault Act Does Not Support Plaintiff

When the foregoing principles are applied, the Court of Appeals opinion should be reversed. If plaintiff's position – that MCL 500.3135(3) references all excess economic losses for which the no-fault act permits limited recovery – were correct, then MCL 500.3135(3) could have said that: losses in excess of personal protection insurance benefits. That would have encompassed all benefits from both MCL 500.3107 and MCL 500.3108.

The first place to start when analyzing this issue is MCL 500.3135(3), which provides in relevant part:

> Notwithstanding any other provision of law, **tort liability** arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101 was in effect **is abolished except as to**:
>
> * * *
>
> (c) Damages for **allowable expenses, work loss, and survivor's loss** as defined in sections 3107 to 3110 in excess of the daily, monthly, and 3-year limitations contained in those sections. . . .

The general rule established by this provision is that tort liability for economic loss is abolished. An exception to the general rule is made for "allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110 . . ." MCL 500.3135(3) does not leave these terms undefined. Instead, it directs the reader to MCL 500.3107 to MCL 500.3110 to ascertain the meaning of these terms.

MCL 500.3107(1) lists three separate types of benefits that qualify as "personal protection insurance [PIP] benefits"; it does not list three separate types of benefits that qualify as "allowable expenses":

> . . . personal protection insurance benefits are payable for the following:
>
> (a) **Allowable expenses** consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. . . .
>
> (b) **Work loss** consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured. . . .
>
> (c) Expenses not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent. [*Id.* (emphasis added).]

It is noteworthy that two of the items listed as PIP benefits in MCL 500.3107(1) (allowable expenses and work loss) are also listed in MCL 500.3135(3), but the third one – expenses for "ordinary and necessary services" an injured person would have performed – is not. If the Court of Appeals were correct – that expenses for ordinary and necessary services are merely a category of allowable expenses – then the 1991 amendments in 1991 PA 191, which moved ordinary expenses from an add-on to work loss, to a separate subsection, would instead have moved the ordinary expense provision to MCL 500.3107(1)(a) where allowable expenses are defined. The absence of a provision there or a reference to ordinary services belies the logic of the Court of Appeals. Format is an indicator of intent. *In re Marin,* 198 Mich App 560, 563; 499 NW2d 400 (1993). Ordinary services have never been grouped with allowable expenses, and the supposition that this is because of limitations is belied by the limitations in MCL 500.3107(1)(a). The latter contains limitations. Regardless, ordinary services has never been an exception to tort abolition in MCL 500.3135. The Legislature intended no-fault to be the only avenue of recovery for ordinary and necessary services, did not intend that these services be treated as allowable expenses, and did not permit tort recovery for these services.

This conclusion is similarly borne out by the fact that MCL 500.3107(1)(a) does not state that <u>all</u> expenses are recoverable; it states that only <u>allowable</u> expenses are recoverable. It then defines allowable expenses as "all reasonable charges incurred for reasonably necessary <u>products, services and accommodations</u> for an injured person's care, recovery, or rehabilitation." The phrase "products, services and accommodations" is defined by context in MCL 500.3157, the only other statute that employs this phrase:

> A physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, may charge a reasonable amount for the **products, services and accommodations** rendered. The charge shall not exceed the amount the person or institution customarily charges for like **products, services and accommodations** in cases not involving insurance. [Emphasis added.]

Thus, if the "services" in MCL 500.3107(1)(a) includes ordinary services in MCL 500.3107(1)(c), those too would have been referenced in MCL 500.3157. The Legislature's consistent use of the phrase "products, services, and accommodations" both in § 3157, the cost containment statute, and in § 3107, the allowable expense provision, and nowhere else in the no-fault act, indicates its intent to confine "allowable expenses" to those pertaining to "medical" and "rehabilitative" "treatment" and "training" expenses and the care associated with these services.[4] This is consistent with the remaining portion of MCL 500.3107, which states that the products, services and accommodations must be for "an injured person's care, recovery, or rehabilitation."[5] Any other expense, to be compensable in the first instance, must qualify as an ordinary and necessary expense under MCL 500.3107(1)(c), is then limited to $20 a day for

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[4] A finding that care associated with medical and rehabilitative services includes nursing/attendant care is supported by the public health code. MCL 333.17201(1)(a) defines the practice of nursing in relevant part as the "application of . . . specialized knowledge . . . to the care . . . of individuals." The "[p]ractice of nursing as a licensed practical nurse" is defined as "the practice of nursing based on less comprehensive knowledge . . . " MCL 333.17201(1)(b). And practice as a trained attendant is defined as the "practice of nursing based on less comprehensive knowledge and skill than that required of a registered professional nurse or a licensed practical nurse . . . " MCL 333.17209.

[5] Indeed, the limitation of care to health care or medical care is evidenced by the public health code itself, which is replete with references to "care" in isolation and instances in which the Legislature has interchangeably used the terms "health care," "care," and "medical care." See, for example, MCL 333.2505(2)(a), (b), (c), (h), (i); MCL 333.5301 through MCL 333.5307; MCL 333.2503; MCL 333.5101(1)(a); MCL 333.5111(2)(g), (3); MCL 333.5114(1)(b); MCL 333.5117; MCL 333.5123(1); MCL 333.5125; MCL 333.5127(1); MCL 333.5129(8); MCL 333.5131(1), (5); MCL 333.5401(1)(e); MCL 333.5653(1)(e); MCL 333.5927(1); MCL 333.9707; MCL 333.16109a; and MCL 333.16213(7)(c), to name a few.

three years, and is not recoverable in tort even if thee is an excess amount in the ordinary expense category.

B. The Comparison to Related Statutes Rules Out Liability.

In the instant case, the Court of Appeals acknowledged that the definition of allowable expenses did not specifically describe ordinary and necessary expenses. *Johnson v Recca,* ___ Mich App ___, ___; ___ NW2d ___ (2011), slip op at 5. It admitted that the cost of ordinary and necessary expenses (or replacement services) was separately defined in MCL 500.3107(1)(c). *Johnson, supra.* It nevertheless concluded that the Legislature intended ordinary and necessary expenses to be a more specific subcategory of the more general allowable expenses on the basis that four statutes, MCL 500.3110(4), MCL 500.3116(4),[6] MCL 500.3135(3)(c), and MCL 500.3145(1),[7] referred to "allowable expenses, work loss, and survivor's loss," but none of these statutes mentioned reasonable and ordinary expenses.

Thus, the logic of the Court's reasoning was that the Legislature intended to include the more specific ordinary expenses in the more general services for "care" in "allowable expenses" in MCL 500.3107(1)(a) and so the excess allowable expenses in MCL 500.3135(3)(c) must carry over ordinary expenses category, too, to allow an excess amount in a tort claim. There are two fundamental flaws in this.

First, courts may not assume that the language chosen by the Legislature was inadvertent. *Lawrence Baking Co v Unemployment Compensation Comm*, 308 Mich

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[6] MCL 500.3116(4) states: "A subtraction or reimbursement shall not be due the claimant's insurer from that portion of any [tort] recovery to the extent that recovery is realized for noneconomic loss as provided in section 3135(1) and (2)(b) or for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110 in excess of the amount recovered by the claimant from his or her insurer.

[7] MCL 500.3145(1) states in relevant part: "If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred."

198, 205; 13 NW2d 260 (1944). As a result, courts do not read into a statute provisions that are not there. *American Federation of State, Co & Muni Employees v Detroit*, 468 Mich 388, 412; 662 NW2d 695 (2003).

Second, it is clear error to read a specific category (such as ordinary expenses) as within a more general category (such as allowable expenses) in a statute like MCL 500.3135(3)(c). Actually, the opposite result is required. Please see *Evanston YMCA Camp v State Tax Comm'n,* 369 Mich 1, 8; 118 NW2d 818 (1962):

> When we construe statutory language containing both specific and general provisions, we adopt the rule set forth in 50 Am Jur, Statutes, § 367, p 371:
>
> "Where there is in the same statute a specific provision, and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision." [*Evanston YMCA Camp, supra* (emphasis added).]

Thus, the Court of Appeals has it backwards. To say replacement services is a specific subcategory of the more general allowable expenses "care" means that replacement services are not within the tort abolition of MCL 500.3135(1)(c) when it refers only to the more general allowable expenses. *Evanston YMCA Camp.* Accord, *William's Delight Corp v Harris,* 87 Mich App 202, 208; 273 NW2d 911 (1978).

Plaintiff's argument based on comparison to other statutes within the no-fault act merely suggests that the Legislature unwisely chose to create replacement services as a distinct category of benefits without symmetry in provisions for accrual, MCL 500.3110(4), out-of-state accidents, MCL 500.3116, and the statute of limitations and one-year back recovery provisions, MCL 500.3145(1). The response to this is three-fold.

First, the statutes at issue here, MCL 500.3107(1)(c) and MCL 500.3135(3)(c) can be construed under *Evanston YMCA Camp, supra.* This Court need not address a hypothetical on statutes not at issue.

Second, it is not the judiciary's function to insert words so as to edit legislation. See *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 424; 565 NW2d 844 (1997).

Third, courts use other means to reconcile, and so if pressed to address these other statutes not at issue as to plaintiff's case, there are reconciling statutes and principles, starting with reading to harmonize seeming inconsistencies. See *In re Petition of State Hwy Comm'n*, 383 Mich 709; 714; 178 NW2d 923 (1970) ("Seeming inconsistencies in the various provisions of a statute should be reconciled, if possible, so as to arrive at a meaning which gives effect to all parts of the statute. . ..").

Thus, MCL 500.3110(4), as to accrual, can be reconciled by the accrual provision in MCL 500.3142(1) ("Personal protection benefits are payable as loss occurs"), and the payment on 30 day's provision in MCL 500.3142(2). If there truly is a case affected by the inapplicability of MCL 500.3110(4) to ordinary service expenses accrual, a court can look at other precedent where RJA provisions have been applied. For example, an RJA statute has been applied to recoupment for which there is no no-fault act limitation provision. See *Titan Ins Co v Farmers Ins Exch,* 241 Mich App 258, 263; 615 NW2d 774 (2000). Therefore, the RJA might apply to a case with an unresolved accrual rule for which MCL 500.3110(4) is inapplicable, as well as one for which MCL 500.3145 does not apply.

MCL 500.3116(4) could also be easily reconciled by MCL 500.3116(2), since there is no issue unless there is a tort recovery by the claimant "for which the claimant has received or would otherwise be entitled to receive personal protection benefits." The hypothetical conflict with sub-section (4) is neither real nor one that cannot be reconciled. If a claimant may recover excess replacement services in another state, the Michigan no-fault insurer never collects under Section 3116(2) or 3116(4) because it never paid for that.

Certainly this is not a situation where this Court can suspend the Constitution and the Legislature and re-write MCL 500.3135(3)(c) to create a tort recovery not legislatively provided. After all, tort recovery is not a primary reparation expectation in light of PIP. See *Husted v Dobbs*, 459 Mich 500, 513; 591 NW2d 642 (1999). This Court should not feel obliged to resolve the straw man argument. Stated otherwise, "[t]he omission of language from one part of a statute that is included in another part should be construed as intentional." *Mericka v Dep't of Community Health*, 283 Mich App 29, 39; 770 NW2d 24 (2009).

III. The Court of Appeals Opinion Logically Requires Eradication of the Distinction Between Types of Care That This Court Has Drawn for Over 100 Years.

Michigan courts have long recognized the distinction between medical nursing/attendant care services, and the "ordinary and necessary services" such as cooking, cleaning, and grocery shopping services for which plaintiff seeks compensation in the instant case. The Court of Appeals decision that most "care" under MCL 500.3107(1)(a) is for the benefit of the person as provided in MCL 500.3107(1)(c) would negate recovery under PIP for much of what is recovered as family provided attendant care since it would be capped at $20 per day and at three years. This distinction

between ordinary services and elevated skills of nursing attendant care has long been recognized and should not be blurred as was done below.

Eighty-two years before the no-fault act was enacted, this Court equated attendant care with nursing services. "Her health and general condition was such that an attendant, or nurse, was necessary." *Sherwood v The Chicago & West Michigan Railway Co,* 82 Mich 374, 385; 46 NW 773 (1890). Similarly, attendant care was recognized to require elevated skills in *Miller v Bd of Registration of Nurses & Trained Attendants,* 336 Mich 35, 36-37; 57 NW2d 320 (1953), which indicated that the then Board of Registration of Nurses and Trained Attendants was required to make rules:

> "for the examination, regulation, licensing and registration of nurses and trained attendants, for defining the minimum curricula of schools of nursing; shall provide for the accrediting of schools of nursing, and shall promote the standards of nursing and nursing education throughout the state." [*Id.*, citing CL 1948 § 338.352.]

See also *Dillon v Lapeer State Home & Training School,* 364 Mich 1, 2; 110 NW2d 588 (1961)("Plaintiff was suspended . . . from her employment as an attendant nurse"); *Trombley v Coldwater State Home & Training School,* 366 Mich 649, 665; 115 NW2d 561 (1962) ("He had . . . performed his duties as an attendant nurse completely satisfactorily"); *Reese v Lamore,* 156 Mich 158, 161; 120 NW 569 (1909) ("She was for a considerable period of time under a physician's care, and had the attendance of a nurse"); *Paulen v Shinnick,* 291 Mich 288, 290; 289 NW 162 (1939) ("The attendant nurse . . . opened the window at her request").

Furthermore, this Court has recognized a distinction between medical care and lesser skilled services in the non-statutory context since at least 1916, when it approved a jury instruction that stated:

> Now, what he has been compelled to pay out for doctors, nursing, medicines, and hospital bills, you see, that is something that you must allow him to make good. Then whatever he has lost in services you must make good to him. [*Foley v Detroit & Mackinac Railway Co,* 193 Mich 233, 236; 159 NW 506 (1916).]

See also *In re Shaw's Estate,* 201 Mich 574, 577-578; 167 NW 885 (1918) (Trial court: "that claim [includes] items for board and washing, and care in the nature of attendance and nursing." This Court: "this case was tried and submitted to the jury upon a wrong theory. The claim sued upon and submitted to the jury contained the items of board and room, which manifestly belonged to the husband of the plaintiff, and recovery should have been limited to the personal services of the plaintiff . . . . it is impossible to say how much was allowed for board and room, and how much for personal services").

The distinction between medical care and lesser ordinary services was similarly drawn in the context of workers compensation in *Kushay v Sexton Dairy Co,* 394 Mich 69, 73 n 5, 74; 228 NW2d 205 (1975).[8] This Court recognized that ordinary services were not covered in the workers compensation provision that is analogous to allowable expenses:

> Ordinary household tasks are not within the statutory intendment. House cleaning, preparation of meals and washing and mending of clothes, services required for the maintenance of persons who are not disabled, are beyond the scope of the obligation imposed on the employer. Serving meals in bed and bathing, dressing, and escorting a disabled person are not ordinary household tasks.

The *Kushay* holding was imported into the no-fault context by the Court of Appeals in *Visconti v Detroit Automobile Inter-Ins Exch,* 90 Mich App 477; 282 NW2d 360 (1979). In *Visconti,* the plaintiff sought recovery for his wife's services for 132 days

[8] The Workers Compensation Act actually provides for compensation for attendant care. MCL 418.315.

at the replacement services rate of $20 a day. *Id.* at 478. There was no mention of the actual services that were performed by the wife; however, before citing *Kushay,* the Court of Appeals relied on 2 Larson's Workmen's Compensation Law, § 61.13, pp 88.253-88.254 to state, suggesting elevated skills care, nor ordinary services:

> "The commonest controversy is whether practical nursing services performed by the claimant's own wife may be made the subject of a claim for nursing expenses. . . . If [the employer has not furnished this kind of nursing service], and the wife then takes over these duties in addition to her regular household work and does exactly what a hired nurse would have had to do, the charge is proper." [*Visconti, supra* at 481 (emphasis added).]

The *Visconti* Court, noting that the Workers Compensation Act and the no-fault act were both no-fault systems, found that it was reasonable to interpret the systems in a like manner when the provisions appeared to be affecting similar policies, thus engrafting the concept of attendant care as defined by this Court in *Kushay* into the no-fault system even though the Workers Compensation Act provides for attendant care and the no-fault act does not.

The allowance of unskilled care as limited to only replacement services in keeping with the Court of Appeals decision in *Visconti* has not been followed. In *VanMarter v American Fidelity Fire Ins Co,* 114 Mich App 171, 174, 175, 181; 318 NW2d 679 (1982), the Court of Appeals expanded PIP attendant care to rule that attendant care/nursing services were compensable as allowable expenses under MCL 500.3107(a)[9] rather than the then replacement services statute, MCL 500.3107(b).[10] It reached this decision by relying on *Kushay* and 2 Larson's Workmen's Compensation Law, § 61.13, pp 88.253-88.254. However, no distinction was made between ordinary

[9] Now MCL 500.3107(1)(a).
[10] Now MCL 500.3107(1)(c).

services and other services. Thus, all unskilled services, even ordinary services were found compensable as allowable expenses.

On the other hand, in *Manley v Detroit Automobile Inter-Ins Exch,* 127 Mich App 444, 453-454; 339 NW2d 205 (1983), rev'd 425 Mich 140; 388 NW2d 216 (1986), the Court of Appeals, relying on *Kushay, Visconti,* and *Van Marter,* held that allowable expenses did not include ordinary household services:

> [MCL 500.3107(1)(a)] specifies that products, services, and accommodations not reasonably necessary for the injured person's care, recovery, or rehabilitation are not "allowable expenses." The necessity for the performance of **ordinary household tasks** has nothing to do with the injured person's care, recovery, or rehabilitation; such tasks **must be performed whether or not anyone is injured**. . . . Products, services, or accommodations which are as necessary for an uninjured person as for an injured person **are not "allowable expenses."** [*Manley, supra* emphasis added).]

This reasoning in *Manley* was cited with apparent approval in *Griffith v State Farm Mut Automobile Ins Co,* 472 Mich 521, 527-528; 697 NW2d 895 (2005), where this Court similarly recognized the difference between an "allowable expense," and, an ordinary expense: "[u]nlike prescription medications or nursing care, the food that Griffith consumes is simply an ordinary means of sustenance rather than a treatment for his 'care, recovery, or rehabilitation.' . . . . We conclude, therefore, that his food costs are completely unrelated to his 'care, recovery, or rehabilitation' and are not 'allowable expenses' under MCL 500.3107." *Id.* at 536.

Now, the Court of Appeals has blurred the distinction between medical care only covered as an allowable expense and ordinary services expenses for which only limited benefits are available. This Court should clarify that family-provided attendant care for ordinary services described in MCL 500.3107(1) (c) is not compensable at elevated attendant care rates. Ordinary services are recoverable only at the $20 a day rate for

three years under MCL 520.3107(1)(c), after which there is no PIP recovery nor tort recovery because it is a separate category of benefits as to which the tort abolition applies.

CONCLUSION AND RELIEF REQUESTED

MCL 500.3135(3)(c) does not permit an injured person to recover through a third-party tort action for ordinary services, even if necessary, household chores such as cleaning, cooking, laundry, or cooking, beyond the caps specified in MCL 500.3107(1)(c). The distinction between medical and rehabilitative care (allowable expenses) and ordinary care as necessary for an injured person as it is for an uninjured person has been recognized by this Court for almost 100 years, and recognized by the Legislature since 1972. The Court of Appeals in the instant case all but obliterated this distinction. In doing so, it created a loophole that encourages additional attendant care type of benefits as a tort claim that will negatively impact the auto reparations industry statewide.

Amicus urges this Court to (a) reverse the Court of Appeals opinion as to tort recovery; (b) clarify and re-establish the distinction between allowable expenses (limited to medical and rehabilitative services and the skilled care associated with those services) and replacement services (ordinary services such as household chores like cleaning, laundry, or cooking) limited by MCL 500.3107(1)(c); and (c) hold that tort recovery for excess replacement services is unavailable under MCL 500.3135(3)(c).

Respectfully submitted,

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Dated: March 28, 2012

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Table 5

Average Premiums and Expenditures 2005-2009

	Combined Average Premium				
STATE	2009	2008	2007	2006	2005
Alabama	783.57	794.76	817.06	819.38	816.68
Alaska	1,072.75	1,082.59	1,105.65	1,134.49	1,155.23
Arizona	968.36	988.01	1,007.80	1,047.35	1,064.70
Arkansas	809.91	800.31	805.38	838.55	852.99
California	894.15	915.87	951.52	974.27	971.88
Colorado	855.64	845.59	860.29	921.57	973.46
Connecticut	1,049.85	1,045.63	1,060.22	1,080.31	1,097.29
Delaware	1,105.63	1,090.66	1,099.20	1,114.86	1,120.23
District of Columbia	1,264.92	1,262.51	1,288.52	1,315.55	1,345.58
Florida	1,088.01	1,130.27	1,124.63	1,152.59	1,148.88
Georgia	919.30	930.64	956.65	964.83	960.54
Hawaii	901.40	930.70	955.31	968.42	961.75
Idaho	665.94	674.37	677.48	695.50	708.68
Illinois	807.30	793.24	805.77	823.77	830.96
Indiana	710.60	699.36	708.73	725.47	758.71
Iowa	631.20	616.51	620.08	644.49	664.40
Kansas	729.19	719.55	713.24	732.80	749.73
Kentucky	828.84	831.50	856.32	881.96	898.66
Louisiana	1,270.28	1,274.34	1,262.14	1,254.66	1,231.71
Maine	682.93	687.31	707.24	738.72	751.53
Maryland	1,021.07	1,010.79	1,025.87	1,056.64	1,067.24
Massachusetts	923.11	970.58	1,056.91	1,124.00	1,200.95
Michigan	1,042.69	1,031.14	1,055.60	1,067.74	1,088.97
Minnesota	776.96	779.92	802.96	842.68	886.88
Mississippi	889.88	902.01	914.26	889.36	894.90
Missouri	783.03	766.06	766.90	787.14	804.44
Montana	817.73	828.83	830.59	837.66	866.82
Nebraska	692.18	676.95	689.03	729.30	770.34
Nevada	1,073.33	1,098.94	1,126.69	1,137.00	1,119.23
New Hampshire	760.62	774.33	802.16	844.00	849.37
New Jersey	1,217.96	1,197.91	1,227.63	1,285.43	1,336.80
New Mexico	897.91	904.86	904.29	913.30	911.75
New York	1,185.40	1,171.97	1,179.36	1,213.14	1,264.21
North Carolina	718.86	704.74	699.45	714.40	730.75
North Dakota	650.36	643.59	657.61	688.58	722.40
Ohio	695.02	692.93	705.47	737.19	755.45
Oklahoma	834.51	815.96	804.34	823.52	846.83
Oregon	807.42	809.95	806.12	812.20	829.65
Pennsylvania	903.78	908.08	916.47	933.19	954.91
Rhode Island	1,117.62	1,137.61	1,174.28	1,197.81	1,225.29
South Carolina	848.80	863.00	878.75	875.48	875.91
South Dakota	651.49	651.33	668.97	697.55	723.56
Tennessee	752.24	757.99	771.17	779.08	788.25
Texas	1,022.19	1,008.61	955.71	977.88	1,013.20
Utah	817.42	808.24	798.40	809.63	819.72
Vermont	723.16	735.08	761.53	788.63	807.53
Virginia	756.51	749.57	749.45	776.66	796.88
Washington	910.06	925.33	927.67	929.68	938.04
West Virginia	964.83	956.83	975.29	987.51	1,029.78
Wisconsin	653.09	641.28	642.47	657.55	686.62
Wyoming	787.35	795.38	797.63	811.85	823.05
Countrywide	**900.90**	**903.29**	**913.66**	**936.84**	**954.88**

MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION

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FOR IMMEDIATE RELEASE
March 16, 2012

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MCCA Premium Set At $175.00 for 2012-2013

Livonia, MI - The premium paid to the Michigan Catastrophic Claims Association ("MCCA") by member insurance companies will be $175.00 per insured vehicle effective July 1, 2012 to June 30, 2013. This represents an increase of $30.00 (21%) over the current MCCA charge of $145.00. The $175.00 assessment represents $141.93 to cover claims; $32.72 to address the $2 billion estimated deficit and $.35 for administrative expenses. The current deficit is estimated at $310.78 per insured car. The MCCA premium charge is determined each year at this time following its annual actuarial evaluation.

Michigan's unique no-fault auto insurance law provides unlimited lifetime coverage for medical expenses resulting from auto accidents and is the only state in the nation that mandates these unlimited benefits. (The state with the next highest level of benefits mandates only $50,000). Created by the state legislature in 1978, the MCCA is a private, non-profit association whose mission is to protect the financial integrity of Michigan's auto insurance industry by providing reinsurance for these unlimited benefits. The MCCA reimburses auto insurance companies for Personal Injury Protection (PIP) benefits paid in excess of $500,000 per claim.

All auto insurance companies operating in Michigan are required to be members and pay premiums for the reinsurance provided by the MCCA. These premiums, together with the insurer's PIP premium, represent the cost to cover the mandatory unlimited medical benefits which, like other costs and expenses, are reflected in the auto premiums all Michigan policyholders pay.

Each year more individuals receive benefits resulting from catastrophic automobile accidents and their claim costs are rising. Estimating the ultimate costs of these benefits requires sophisticated analysis but the trend of increasing costs is a key driver of changes to the MCCA assessment.

The MCCA paid out $927 million (more than $133 per insured car) in 2011 for claim costs resulting from catastrophic injuries. The majority of these catastrophic injuries involve closed-head injuries, paraplegia, quadriplegia and burns. Since 1979, there have been over 28,000 claims reported to the MCCA, which will cost an estimated $85 billion.

Additional information on the MCCA, including claim payment statistics, audit reports and answers to frequently asked questions can be obtained from its public website: www.michigancatastrophic.com and from the website of the Michigan Office of Financial and Insurance Regulations: www.michigan.gov/ofic

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